No. 260

SEP 28 1945

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

LAKE-DEARBORN CORPORATION,
a corporation,
Plaintiff,

v.

GILBERT S. ELLITHORPE and
EVELYN ELLITHORPE,
Defendants.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

GILBERT S. ELLITHORPE, on behalf of himself and all stockholders as a class, and LAKE-DEARBORN CORPORATION,
Third-Party Plaintiffs and Petitioners,

v.

ALBERT T. OSBORN, [illegible]
CHARLES HALEY [illegible]
TODHUNTER, and [illegible]
AND JOHNSTON, [illegible]
Third-Party Defendants and Respondents.

REPLY TO ANSWER TO PETITION FOR WRIT OF CERTIORARI

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Defendants.

GILBERT S. ELLITHORPE, on behalf of himself and all stockholders as a class, and LAKE-DEARBORN CORPORATION,
Third-Party Plaintiffs and Petitioners,

vs.

ALBERT Y. OSBORN, MYRON FRANTZ, CHARLES RALPH JOHNSTON, P. NEWTON TODHUNTER, and the Firm of FRANTZ AND JOHNSTON, (R. 55 and 67),
Third-Party Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit.

Honorable Michael L. Igoe, District Judge.

REPLY TO ANSWER TO PETITION FOR WRIT OF CERTIORARI.

The Right Parties Are On This Record.

The true meaning of the case of *Industrial Commission of New York* v. *Irving Trust Company* (1931), 286 U.S. 543, which is cited by Respondents at Page 13, does require this Petition to be pursued by the parties who have brought

it to this Court. That case does not aid the Respondents.

The Proofs of Service, and Acceptance of Service upon Respondents by Counsel of Record which are on file in this Court and the Court of Appeals, and also in the District Court, are not questioned by any motion before any Court. The bold statements and argument at Pages 1 to 13 and 26 of the Answer, ignore the basic facts of this record which remain unquestioned and free from attack. Many of these bold statements are contrary to the Record. The Answer for Respondents uses the artful device of citing over and over again a few citations.

Cases Mentioned By Respondents.

Respondents cite at Page 19 of Answer the case of *Cleveland C. C. & St. L. Ry. Co.* v. *Henry* (1933), 290 U.S. 627, which is denial of certiorari from 332 Mo. 1072. In that case the Missouri Courts set aside a verdict and granted a new trial. Such a record has no pertinency whatever in relation to this case at bar.

General Taxicab Association v. *O'Shea*, 109 Fed. (2d) 671, which is cited at Page 20 of the Answer, ignores the fact that Rule 14 is based upon and worded like the rule in admiralty. That case quotes rules in Wisconsin and Pennsylvania, which are worded very differently from Rule 14 and the admiralty rule. The other cases listed at Page 14 of Answer are not in point for like reasons.

The Petition at bar at Pages 11 and 12, shows why the case of *Allen Calculators* v. *National Cash Register Company*, 322 U.S. 137, does not aid the respondents and shows why the quotations therefrom at Page 18 of Answer are not in point on this record.

Ikeler v. *Detroit* (1939), 30 F.S. 643, which is cited at Page 23 of Answer Brief, is not in point because in that case, an attempt was made by assignment of an interest

to create a diversity of citizenship jurisdiction. This record at bar is free of any similar act.

Saba v. *Katz* (1944), 55 Supp. 1000, cited at Page 24 of Answer Brief is not in point because Third Party Complaint at bar is on behalf of non-resident Corporation and thereby diversity of citizenship as well as ancillary relation to main case both exist in this record.

Pueblo DeTaos v. *Archuleta,* (C.C.A. 10; 1933), 64 Fed. (2d) 807, which is discussed at Page 25 of Answer is not in point. That decision was under a special local rule of Court for docket clearance. It was decided five years before the Federal Rules of Civil Procedure were adopted by Congress and by this Court.

Respondents Ignore The Record.

The Respondents do not challenge the points or citations or argument presented by Petition and Opening Brief. The right and power of petitioners to present the complaint was not challenged in the District Court by any motion or statement to that effect. The By-laws and Resolutions of the Corporation show ample right power and authority to sustain this Third Party proceeding. That written authority would have been produced on the record in the District Court if any such contention had been made in this case. The existence of that authority was admitted by Respondents by the complaint which began this suit. See Record 2 (First Paragraph): 11(k); 17(2), (3), (4), (6); 19-20(5).

As shown by the record at Page 86, and by the petition for writ of certiorari at Page 4, the order in the District Court from which this appeal was taken, was intended by Mr. Johnston and the Court to be final for all purposes. This is the language of the record:

"Mr. Johnston: *Can that be with prejudice,* if your Honor please, *so that this cannot be renewed at a later date?*

"The Court: *Yes, with prejudice.*

"Mr. Johnston: *Dismissed with prejudice.*

"The Court: Yes, sir.

"Mr. Johnston: Thank you, your Honor."

The argument by the Answer to the contrary by the respondents in this Court, is extreme stultification. When counsel for respondents asks this Court to disregard his own language and purpose aptly expressed at the time of hearing in the District Court, he does so after the petitioners have gone the distance of taking an appeal to the Court of Appeals and bringing the record here. He requests that this Court erase the meaning of all words and destroy the bottom upon which any review in any case could be based. The words used in the District Court by said counsel for respondents, were most deliberate and most exact. The argument made in the Answer in this Court seeks to ignore the record basis for this review.

Furthermore, the argument made by the Answer would erase all benefit and purpose from Rule 14 of Federal Civil Procedure. The respondents contend here by the Answer that they as attorneys can rush into Court and file a suit in the name of the Corporation and get an injunction against the stockholders before any answer is filed. But that said stockholders cannot in the same suit file a Third Party Complaint in the name of the Corporation on behalf of all the stockholders and the Corporation against these same attorneys, when the facts are admitted for the purpose of this record, that they sought the injunction to cover up their own failure to protect and defend the Corporation in the manner required by their retainer. The respondents ask this Court to rule that the question whether the harm to the Corporation was caused by the attorneys must be tried in two separate lawsuits, and that since the attorneys

having the ear of the Court and being faster on their feet got an injunction, forbidding the President from pursuing any action in any other case or any other Court, the President and all stockholders whom he represents must wait until the litigation begun by the attorneys and against him has been fully concluded, and only thereafter the question of responsibility of the attorneys for the wreckage of the corporate affairs may be heard by the Court in a separate suit. Such an argument seeks to destroy all effective purpose for Rule 14 of Federal Civil Procedure. It seeks to revive the ancient practice of common law. It says in effect that these respondent attorneys should be allowed by their suit to manhandle the President, and that if he survives this lawsuit, the Court will then allow the stockholders to contest with the lawyers in a separate suit.

Textbook Citation By Respondents.

The only part of the Answer which seeks by any reason to meet any part of the Petition, is a quotation from Moore's Federal Procedure. That Book is out of line and contrary to all the cases and authorities cited in the Petition now before this Court. The text of the Moore Book was written before the Federal Rules of Civil Procedure went into effect in 1938, and was published before any of the Courts had any opportunity to consider the nature and effect of Rule 14. Your petitioners submit that the Moore Book is not an authority, is merely the opinion of the text writer of what he thought the law was going to be. That Book is not based upon any ruling made by any Court upon independent consideration of Rule 14. The Moore Book is mere speculation made in advance of the effective date when the Rule became effective. That speculation was made early in the summer of 1938, and without the benefit of any of the decisions and any of the reasons stated in the petition now before this Court. The fact that the Respondents rely upon the Moore Book does show a sufficient confusion to warrant this Court in taking this case,

and clarifying the law by the final authority of this Court as to the meaning of Rule 14.

The Writ Should Be Granted.

Petitioners respectfully state that this case in the District Court has been continued until March 25, 1946, upon the motion for that purpose which was made on September 18, 1945 by Charles Ralph Johnston.

Petitioners respectfully refer to their Petition and Brief and request that the writ be awarded and this case be heard by this Court.

Respectfully submitted,

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